UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS ST. YVES,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Docket No. 02-187-B***
	)	
JEFFREY MERRILL, WARDEN,	***)***	
MAINE STATE PRISON,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Washington County) on charges of reckless or negligent manslaughter and abuse of a corpse, in violation of 17-A M.R.S.A. §§ 203 and 508. I recommend that the court deny the petition without a hearing.

Procedural Background

On April 29, 1998 a grand jury in Washington County indicted the defendant on one count of reckless or negligent manslaughter, in violation of 17-A M.R.S.A. § 203(1)(A), and one count of abuse of a corpse, in violation of 17-A M.R.S.A. § 508(1). Indictment, *State of Maine v. Thomas St. Yves*, Maine Superior Court (Washington County), Docket No. CR-98-86. After a jury trial the defendant was convicted on both counts and sentenced to concurrent terms of twenty-five years, all but twenty suspended, on the homicide count and 364 days on the abuse count. Judgment and Commitment, *State of Maine v. Thomas St. Yves*, Maine Superior Court (Washington County), Docket No. CR-98-86.

On March 8, 1999 the defendant filed a motion to suppress statements he had made on February 26 and 27, 1998 and the remains of the victim. Docket, *State of Maine v. Thomas St. Yves*, Maine Superior Court (Washington County), Docket No. CR-98-86, at 2; Memorandum in Support of Motion to Suppress, *id*., at 1. Following a testimonial hearing, the motion was granted as to statements made by the defendant on February 26, 1998 at his home and as to some of the statements made by the defendant on that day at the Calais police station and otherwise denied. Order on Motion to Suppress, *id*., at [8]-[9]. The trial took place between June 15 and 18, 1999. Docket, *id*. [Sagadahoc County], at 1.

The defendant filed an application to allow an appeal of the sentence. Docket, *id*. [Washington County] at 6. Leave to appeal from the sentence was denied. Order [dated February 10, 2000], *State of Maine v. Thomas St. Yves*, Sentence Review Panel, Maine Supreme Judicial Court, Docket No. SRP-99-63. The defendant also filed an appeal from his conviction. In that appeal he challenged the court's ruling on the motion to suppress and the sufficiency of the evidence to support his conviction. Brief of the Appellant, *State of Maine v. Thomas St. Yves*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. WAS-99-584 ("Law Court Brief"), at 6. The Law Court denied this appeal. *State v. St. Yves*, 751 A.2d 1018, 1024 (Me. 2000).

On March 8, 2001 the petitioner filed a petition for post-conviction review in the Maine Superior Court. Docket, *Thomas St. Yves v. State of Maine*, Maine Superior Court (Washington County), Docket No. MACSC-CR-2001-00042, at 1. The petition asserted three grounds for relief, presented as four grounds: ineffective assistance of counsel, introduction of illegal evidence and failure to prove guilt beyond a reasonable doubt. Petition for Post-Conviction Review, *Thomas St. Yves v. State of Maine*, Maine Superior Court (Washington County), Docket No. [CR-01-42], at 3-4. As the basis for these grounds, the petitioner asserted that

> My trial attorney did not provide me with copies of the discove[r]y in this case in a timely manner. As a result of [sic] I was hampered in my efforts to obtain expert witnesses concerning the cause of my daughter's death. I was unable to participate in my defense in a meaningful way. My attorney took actions that I was not consulted on. My attorney took action that I did not know he would take and which I did not approve. I felt at his mercy because he did not explain his thinking and dismissed my concerns and questions summarily.
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> My attorney failed to completely investigate the facts of my case. I directed his attention to witness, [sic] both and [sic] lay who would be beneficial to my case. He did not contact many of them. I did not have access to my discove[r]y. I was unable to direct his investigation to areas which were beneficial to my case. I got the distinct feeling that he wanted to get the [sic] over with as s[o]on as possible.
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> The trial Court allowed the introduction of statements that I made to Stat[]e Police investigators on February 26-27. These statements were made at the Calais Police Station. The trial court permitted State to use them in the case against me. Likewise, the trial Court allowed the evidence [sic] the finding of my baby's body. All of this evidence flowed from the original [sic] of me, which the Court had ruled was inadmissible.
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> There were a number of explanations of my ba[]by's death, consistent with the evidence. These explanation [sic] the death did not result from negligence or neglect on my part. The State's evidence showed that death resulted from lack of oxygen to the brain. It did not demonstrate that I caused this lack. The Court should have dismissed the count of manslaughter.

Id. The Superior Court dismissed the third and fourth claims on the state's motions because such claims are subject to review only on direct appeal. Order [dated January 14, 2002], *Thomas St. Yves v. State of Maine*, Maine Superior Court (Washington County), Docket No. CR-01-42. The parties then agreed that the petitioner would present only three distinct claims of ineffective assistance of counsel for resolution in the post-conviction proceeding: a claim that his trial lawyer convinced him not to testify despite his desire to do so, a claim that he was unable to participate in his defense because his trial counsel did not provide him with copies of discovery material and a claim that his trial lawyer did not follow up on securing an expert witness to address the victim's cause of death despite the defendant's identification of such an expert. Decision [dated April 19, 2002], *Thomas St.*

Yves v. State of Maine, Maine Superior Court (Washington County), Docket No. CR-01-42 ("State Post-Conviction Decision"), at 2. After an evidentiary hearing, the court denied the petition. *Id*. at 3, 8. The defendant filed a notice of appeal from this decision. Notice of Appeal, *State of Maine v. Thomas St. Yves* [sic], Maine Superior Court (Washington County), Docket No. CR-01-42. He subsequently filed a request for a certificate of probable cause, as required by M. R. App. P. 19, in which he raised the second and third grounds that had been pursued before the Superior Court. Request for Certificate of Probable Cause, *Thomas St. Yves v. State of Maine*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. WAS-02-285, at [3]-[7]. The Law Court denied the certificate. Order Denying Certificate of Probable Cause [dated August 14, 2002], *Thomas St. Yves v. State of Maine*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. Was-02-285. The petitioner's motion for reconsideration was also denied. Order [dated September 10, 2002], *Thomas St. Yves v. State of Maine*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. Was-02-285. Acting *pro se*, the petitioner filed a motion for extension of time in which to file a petition for writ of certiorari from the United States Supreme Court, Motion for Extension of Time, *Thomas St. Yves v. State of Maine*, United States Supreme Court [Application No. 02A526], which was granted to February 7, 2003, Letter dated December 27, 2002 from William K. Suter, Clerk, to Andrew Ketterer.

The petitioner filed the instant action on December 4, 2002. Docket.

Factual Background

The Maine Law Court set forth the relevant facts about the charges against the defendant as follows:

> Denise St. Yves, the defendant's wife, gave birth to a daughter, Faith Ann, on January 9, 1998. At the hospital, Denise had identified herself as "Ann Morin," and she declined to give the hospital her social security number. Denise was accompanied at the hospital by St. Yves and another daughter,

Katrina, then three and one-half years old. . . . [H]ospital staff contacted the Department of Human Services.

The Department referred the matter to Public Health Nursing, who sent a nurse to attempt to contact the St. Yves family. The address that the St. Yveses had given the hospital turned out to be false, but by January 30, the nurse finally located the St. Yveses' trailer. On five separate visits, however, no one answered the door.

The Department received another referral regarding the safety of the St. Yves children from a food stamp worker on February 17, 1998. . . .

Upon this second referral, the Department assigned a child protective services caseworker who attempted to contact the St. Yveses at their home on February 19. No one answered the door, but the caseworker could hear a child inside. . . . The caseworker and police made four additional unsuccessful attempts to check on the children over the next few days.

The Calais police then discovered that Ann Morin was in fact Denise St. Yves, and that there was an outstanding warrant for her arrest on theft charges in New Hampshire. A search warrant was obtained to allow the police to enter the trailer to search for and arrest Denise. The police arrived, along with a caseworker, and after first requesting admission, began prying open the door. St. Yves opened the door and physically grappled with the officer at the door. To protect the officers during the search for Denise, the one officer place St. Yves in handcuffs and led him outside. St. Yves claimed that Faith was with "Ann" and the two were in New Hampshire. The police eventually located "Ann" (Denise) in the trailer and placed her under arrest. Contradicting her husband, she claimed that Faith was not with her, but rather was with her grandparents in New Hampshire.

During the arrest of Denise, the officers observed that the St. Yveses' trailer was quite cold, and was filled with trash and dog urine and feces. Katrina . . . was taken into emergency custody by the caseworker. . . . The police took Denise to the station, leaving one officer behind with St. Yves to determine where Faith was. The handcuffs had been removed, and St. Yves and the officer reentered the trailer.

As they sat at the kitchen table, the officer spoke to St. Yves, who was alternatively very quiet or crying. The chief of police returned shortly to the trailer, and took part in questioning St. Yves about the whereabouts of his infant daughter. After a short time, St. Yves admitted that Faith was in the trailer, and told them where to find her. When they asked for his consent to search the room indicated, St. Yves said "you'll never find it," went into that room, and returned with a closed box. In the box was the body of an infant girl. It had been wrapped in a garbage bag and blankets and had been placed

> in a box. The baby had obviously been dead for days. After the officers received the box from St. Yves, they undertook no further search until they had received a warrant.
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> An autopsy was performed on Faith's body the next day. The medical examiner testified that, in her opinion, Faith had died from anoxic brain injury; i.e., an injury to the brain caused by lack of oxygen. According to the medical examiner, this was consistent with suffocation caused by holding an infant's mouth closed or by suffocating her with blankets. The examiner also testified that an infant could remain alive but comatose for some time after such an injury. The examiner had found no evidence that Faith had died from natural causes.
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> St. Yves was taken to the police station and was interviewed by the State Police. St. Yves initially denied harming Faith, but eventually told police that the baby's crying had led him to "retaliate." He told the police that he had tried to close Faith's mouth to stop her crying, and that on several occasions he had placed Faith face down on a couch, covered her with blankets, and pressed down until she stopped crying. He admitted that, after she died, he wrapped her body in plastic, but he asserted that Denise had placed her in the box. He then turned down the heat in the room where the body lay in order to prevent decomposition.

State v. St. Yves, 751 A.2d at 1020-21 (footnotes omitted).

Discussion

The petitioner raises thirteen grounds for relief in his petition: five assert ineffective assistance of counsel, one asserts admission of "illegal" evidence, one asserts failure to prove his guilt beyond a reasonable doubt, four allege police misconduct, and two allege wrongful rulings by the trial court. Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 1) at 5- [6B].[1] The respondent contends that the following grounds are procedurally defaulted, because they were not presented to or addressed by the Maine courts: ground one (other than the claim respecting discovery material), ground two (other than the claim respecting the expert

[1] To the extent that the petitioner means any of his challenges to address his conviction for abuse of a corpse, he has fully served the sentence imposed on that conviction, Judgment and Commitment at 1, and is no longer in custody with respect to that conviction. Accordingly, he cannot seek relief with respect to that conviction under 28 U.S.C. § 2254. *See Maleng v. Cook*, 490 U.S. 488, 491-93 (1989).

witness), ground three (other than the claim respecting suppression of the victim's body), and grounds five, six, seven, eight, nine, ten and eleven. Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, etc. ("Response") (Docket No. 4) at 21.

The statute governing the relief sought by the petitioner provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
> **(B)(i)** there is an absence of available State corrective process; or
> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Here, there is no suggestion in the record that the state has not made corrective process available to this defendant or that the available process is ineffective to protect his rights.

In this case, it is clear that the defendant did not present to the Maine courts either on direct appeal or in his petition for post-conviction review the following claims included in his petition to this court: Ground one, ineffective assistance of counsel because the trial attorney "took many actions which I disapproved. He acted without my approval;"[2] Ground two, ineffective assistance of counsel because the trial attorney "failed to thoroughly investigate the facts. He did not . . . investigate areas of concern;" [3] Ground three, wrongful admission of statements made to state police investigators on February 26 and 27, 1998; Ground five, alleging that his confession was coerced by Maine State Police investigators; Ground six, alleging that the State Police investigators continued his interrogation after he invoked his Fifth Amendment right against self-incrimination; Ground seven, alleging that the

[2] The defendant did initially present a somewhat similar claim in his petition for post-conviction review in state court, as noted above, but he waived that claim by agreeing to a specific set of three claims as set forth in the decision of the post-conviction review justice. Even if that were not the case, the claim as presented here is so conclusory and lacking in specific factual support that it cannot be addressed by this court. *See United States v. LaBonte*, 70 F.3d 1396, 1412-13 (1st Cir. 1995).

trial court denied his request for an expert witness; Ground eight, ineffective assistance of counsel because his trial attorney "did fail to impeach prosecution witness when it became known during trial testimony was false;"[4] Ground nine, alleging that the court denied the petitioner's "numerous letters and numerous FOIA requests for recorded testimony of prosecution witness given during Child Protection Proceedings which conflicted with trial testimony;" Ground ten, ineffective assistance of counsel because the petitioner's trial attorney "did fail to raise Apprendi issue when it became known through U.S. Supreme Court decision;"[5] and ground eleven, ineffective assistance of counsel because the trial attorney did not ask for a speedy trial and told the petitioner that only defendants facing extradition were allowed to have a speedy trial. Petition at 5-6[B]. Accordingly, these claims have not been exhausted and may not be addressed by this court.

Ordinarily, the presence of both exhausted and unexhausted claims in a petition for relief under section 2254 requires the federal court to dismiss the entire petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, the respondent in this case does not seek dismissal on this basis. By operation of 15 M.R.S.A. § 2128(3), the defendant may not bring these unexhausted claims in state court. This fact means that the claims are procedurally defaulted. A procedural default in state court acts as an adequate and independent state ground and immunizes a state court decision based on that default from habeas review in federal court. *Carsetti v. State of Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991). While there is no state court decision on the defaulted claims in this case, the outcome of any attempt by the petitioner to raise them at this time is clear; the state courts would hold that those claims are procedurally barred. That is sufficient to allow application of the doctrine. *Id*. at 1010-11. The

[3] This ground also lacks sufficient factual detail. *LaBonte*, 70 F.3d at 1412-13.
[4] This ground also lacks sufficient factual detail. *LaBonte*, 70 F.3d at 1412-13.
[5] The petitioner originally raised a somewhat similar issue in a *pro se* pleading in connection with his state petition for post-conviction review, *Pro Se* Supplemental Brief, *Thomas St. Yves v. State of Maine*, Maine Superior Court (Washington County), Docket No. CR-01-42, at 2, but that document was filed after the petition had been filed, without seeking leave to amend the pleadings, and the
(*continued on next page*)

petitioner has made no attempt to demonstrate both the cause for the procedural default and the prejudice to his case that is required to avoid application of the procedural-default doctrine, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and accordingly this court will not consider the unexhausted claims for this reason as well. *See generally Burks v. Dubois*, 55 F.3d 712, 716-17 (1st Cir. 1995).

The respondent contends that grounds three, twelve and thirteen of the petition all present "claims that the search for and seizure of Faith's body was in violation of his Fourth Amendment rights." Response at 15. If grounds twelve and thirteen may indeed be read so narrowly, and thus as restatements of claims that were in fact presented to the state courts, the respondent suggests that the petitioner's Fourth Amendment claims may not be considered by the federal courts under the circumstances of this case. *Id*. at 22-23. Under governing First Circuit precedent, the respondent is correct.

> *Stone* [*v. Powell*, 428 U.S. 465 (1976)] . . . stands for the proposition that a federal habeas court ordinarily cannot revisit a state court's disposition of a prisoner's Fourth Amendment claims. Withal, this proposition is not absolute; there is an exception for instances in which a habeas petitioner had no realistic opportunity to litigate his Fourth Amendment claim fully and fairly in the state system. This exception survives the passage of the AEDPA.
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> The petitioner bears the burden of proving that his case fits within the contours of the exception.

Sanna v. Dipaolo, 265 F.3d 1, 8 (1st Cir. 2001) (citations omitted). The petitioner in this case has offered nothing to meet his burden of proof on this point. "[T]he mistaken outcome of a state court suppression hearing, standing alone, cannot be treated as a denial of the opportunity fully and fairly to

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issue was waived when the defendant agreed at the time of hearing to proceed with only the three issues specified in the post-conviction justice's opinion.

litigate a Fourth Amendment claim (and, thus, cannot open the door to federal habeas review)." *Id.* at 9.

It appears more likely to me that grounds twelve and thirteen were not raised by the petitioner in any of the state-court proceedings. Those portions of the petition provide:

> L. Ground twelve: Police continued to maintain their custody of Appellant after their search warrant had been executed[.] Supporting facts: The Appellant was kept in police custody in his home after the police executed their search warrant looking for Appellant's wife and finding her.
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> M. Ground thirteen: Police re-entered Appellant's home without permission or a warrant after their search warrant had been executed looking for Appellant's wife. Supporting facts: Calais Police Officer did re-enter the Appellant's home after the Appellant asked to be let back inside because he was cladly [sic] dressed, having been held in handcuffs outside in the sub-zero temperatures by a police officer for several hours, Appellant was allowed to go back insider after being uncuffed. Police officer followed Appellant back inside home without being asked inside or without a warrant.

Petition at 6[B]. These assertions do not appear to be mere restatements of an assertion that the Superior Court erred in denying the petitioner's motion to suppress the discovery of the body of the victim. Law Court Brief at 6, 7. However, if these grounds were not raised in the state courts, they have been procedurally defaulted for the reasons already discussed in connection with several other grounds asserted in the petition. The petitioner is not entitled to relief on these grounds under either characterization.

Ground four of the petition alleges that "[t]he State failed to prove my guilt beyond a reasonable doubt," and provides as supporting facts the assertions that "[t]here were a number of explanations for baby's [sic] death. The evidence indicated death by lack of oxygen. The State did not prove that I caused this lack." Petition at 6. This claim was adjudicated on the merits in the petitioner's direct appeal to the Maine Law Court. *State v. St. Yves*, 751 A.2d at 1024. The governing statute provides, in relevant part:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
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> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
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> **(e)(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d) & (e)(1). Here, nothing in the minimal submission by the petitioner comes close to rebutting, by clear and convincing evidence, the factual finding in the state courts that he caused the death of the victim. Accordingly, the petitioner is not entitled to relief on the basis of any assertion that this factual finding was incorrect.

> A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result. A state court decision involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case."

Mello v. Dipaolo, 295 F.3d 137, 142-43 (1st Cir. 2002) (citations omitted). Here, the Maine Law Court addressed the petitioner's claim that the evidence presented at trial was insufficient to support his conviction by concluding that "the evidence was sufficient for a rational jury to have concluded that the State met its burden in proving beyond a reasonable doubt each element of the crime of manslaughter." *State v. St. Yves*, 751 A.2d at 1024. This decision is not contrary to clearly

established federal law; it is completely consistent with such law. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (in § 2254 proceeding petitioner is entitled to relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt"). Nor am I aware of any decision of the Supreme Court that involved a set of facts that are materially indistinguishable from the facts presented in the state court in this case. Finally, the governing principle concerning sufficiency of the evidence was not unreasonably applied to the facts in this case. There is no need to look beyond the facts presented in the Law Court's opinion as quoted above to reach this conclusion.

The petitioner's remaining exhausted claims allege constitutionally ineffective assistance of counsel. Specifically, the exhausted portion of Ground one asserts that the petitioner's trial counsel "did not provide me with any discovery material" and the exhausted portion of Ground two claims that this attorney "did not consult expert witness." Petition at 5. Such claims are evaluated under the standards established by *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that his counsel's performance was deficient, *i.e.*, that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the petitioner must make a showing of prejudice, *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. The court need not consider the two elements in any particular order; failure to establish either element means that the petitioner is not entitled to relief. *Id*.

The court reviewing these claims in the state post-conviction proceeding held as follows:

> The Defendant maintains that he was never given any discovery material and therefore he could not participate effectively in the preparation of his defense. The assigned counsel fee voucher submitted by his first lawyer, however, reflects that his first lawyer provided at least some discovery to the Defendant on June 16, 1998. . . . The court notes that the lawyer, who is the

subject of this petition, did not become involved in the case until January 25, 1999.

When he did become involved in the case, the trial lawyer filed a motion to suppress and a motion for change of venue. The motion to suppress, which was in part successful, resulted in an evidentiary hearing that the Defendant attended. The evidence presented at this hearing approximately three months before trial was essentially a preview of the evidence that was later presented at the Defendant's trial.

By the time of the hearing in this matter, the Defendant had received at least the State's original discovery package from his first lawyer; he had been present at the motion to suppress evidence; and he had been present for his trial. The trial transcript had been presented to his attorney on appeal and presumably the Defendant had access to that as well. Assuming for argument's sake, that neither of the Defendant's lawyers had ever given him any discovery, certainly by the time of hearing on his petition, he had been exposed to all of the available information pertaining to his case. He was unable, however, to identify anything that he would have done differently at trial or to identify any prejudice at all flowing from his contention that he didn't have adequate access to information about his case at or before the time of trial. It is the Defendant's burden to demonstrate prejudice resulting from a claim of ineffective assistance of counsel and the court finds that he has failed to do so.

* * *

Prior to trial, the Defendant had written a letter dated June 14, 1999 to the court raising issues about not having a complete copy of the discovery in his case, [and] about not having his own expert witness . . . .

This letter prompted the court to address the issue regarding the lack of a defense expert directly with trial counsel and the Defendant. The record reflects not only that trial counsel had explored the medical issues of the case with independent medical experts as well as [] with the State's expert, but that there did not appear to be any disagreement with regard to the medical conclusions that the State's expert witness had drawn. The principal area of dispute in the case appeared to be with regard to the manner of death rather than with regard to the cause of death. The State's witness did not address the manner of death. . . . Trial counsel came to the reasonable conclusion that it made little sense to call a separate medical expert to provide the same evidence that the State's medical expert was going to provide on a point that was not in dispute. Having determined that trial counsel had in fact adequately investigated this aspect of the case and was prepared for trial, the court went forward with trial with the Defendant's consent.

> In any event, the record also makes clear that, Dr. Pole, the expert witness which the Defendant now claims should have been called, was not available on the date of trial. Trial in this matter commenced on June 15, 1999 and was concluded on June 18, 1999. Although trial counsel did not forward the medical discovery in this case to Dr. Pole for review, he did speak with him and learned that he would not be available for trial and in fact would not be available at all until after June 20, 1999.
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> The Defendant did not produce any evidence at hearing of this matter to prove that he was prejudiced by not having Dr. Pole testify at his trial, It is also clear that Dr. Pole was not available for the Defendant's trial. In order to demonstrate prejudice from trial counsel's failure to call a witness, the Defendant must demonstrate both the availability of the witness for trial and the nature of the witness's testimony. The court finds that the Defendant has done neither and he has therefore failed to sustain his burden of proof on this petition.

State Post-Conviction Decision at 6, 7-8 (footnotes and citations omitted). The petitioner has made no attempt to show that the adjudication of these claims by the Maine post-conviction court resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, the standard applicable to this claim under 28 U.S.C. § 2254(d)(1). Nor has he demonstrated that the state court's factual determinations were unreasonable, a necessary prerequisite for the only other source of relief. 28 U.S.C. § 2254(d)(2). This is the test that this court must apply. *Phoenix v. Matesanz*, 233 F.3d 77, 82-83 (1st Cir. 2000). *See generally Familia-Consoro v. United States*, 160 F.3d 761, 765 (1st Cir. 1998) (discussing statutory presumption in context of claim of ineffective assistance of counsel). The state post-conviction review court correctly applied the prejudice prong of the *Strickland* test to these claims and accordingly the petitioner is not entitled to relief under section 2254 on these grounds.

Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of March, 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

Defendant

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